United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

B P/S

T-3130
74-1300

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT

THOMAS MOORE, ET AL.
Appellant

v.

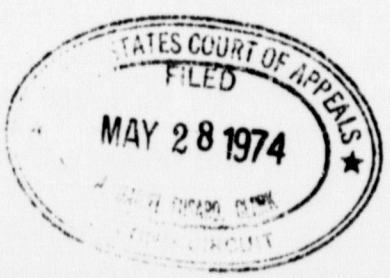
JOSEPH BETIT, ET AL.
Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

OF THE DISTRICT OF VERMONT

Docket No. 73-2

REPLY BRIEF OF APPELLANT



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Jurisdiction attaches at the moment a complaint is filed and a change in the cause of action will not defeat jurisdiction previously acquired. Anderson - Thompson, Inc. v. Logan Grain Company, 238 F 2d. 598, (1956).

Subsequent to the filing of this suit sixteen (16) full-time Case Aide and Case Aide Trainee positions were created by the Department of Social Welfare. A-50.

Social Welfare's alleged compliance with 45 C.F.R. §225.2 is rooted in the hiring of these persons which, occurring after this suit was commenced, cannot effect jurisdiction.

Moore and Welfare Rights rely for jurisdiction upon the facts alleged in the Complaint (A32-39) and those stipulated to by the parties. (A48-50). An evidentiary hearing was never held in this matter nor did the opinion below hold that Moore and Welfare Rights have failed to carry their burden in establishing the facts on which they claim jurisdiction.

The Court below accepted the facts alleged (A-51-52) but determined that upon those facts jurisdiction did not exist. The existence of the facts alleged is not in issue.

Moore and Welfare Rights Second Amended Complaint states their claim, the facts and the law clearly.

This Court by applying the precedents outlined in Plaintiffs' brief to be facts alleged by Moore and Welfare Rights and stipulated to by Social Welfare will be able to find that the District Court had jurisdiction.

The final relief sought by Moore and Welfare Rights was a permanent injunction requiring Social Welfare to abide by the terms of the State plan and Federal law with the consequent employment of numerous persons, as evidenced by the positions created subsequent to the filing of this suit, under a merit system. The subject of controversy is whether or not Social Welfare must hire low income persons or welfare recipients to be employed in the business of the Department in order to be in conformity with Federal Law and the State plan. (A-49, A-50).

Social Welfare attempts to distinguish the facts of Bass v. Rockefeller, 331 F. Supp. 945 (1971) from the present action on the basis of the interest in distribution test in terms of whether or not it matters who receives the benefits which would arise if the relief sought were to be granted. The alleged distinction is that in Bass it did not matter who received the medicaid payments but that in this case it does matter who receives which job. Moore and Welfare Rights members are not claiming a right to a specific job. They have no right to any certain position. However, they do have rights under the Federal Statutes upon which this action is based and the State plan that a fund of positions be available. To the extent that their positions are required to be created they have a stake in those positions every bit as great and as significant as that of a medically needy person's stake in having medicaid available should he become eligible for its benefits.

That Moore and Welfare Rights have a stake in the creation of the position sought can

be seen from the fact that they clearly have standing to present these claims, Sierra Club v. Morton, 405 U.S. 727, 31 L.Ed. 2d. 636, 92 S.Ct. 1361 (1972) and that they are employable in the positions which might be created. That they do not have a stake in the distribution of the individual jobs can be seen from 45 CFR §225.2 which requires the State plan to provide for methods of recruitment and selection which offer opportunity for full-time or part-time employment of persons of low income and little or no formal education, including employment of young and middle aged adults, older persons and the physically and mentally disabled and of recipients and will provide that such subprofessional positions are subject to merit system requirements.

Clearly viewed from Moore and Welfare Rights members viewpoint it does not matter as a matter of law who receives which job but they do have an interest that the fund of positions be available.

In addition, the interest in distribution test is to be viewed from the position of Social Welfare which has no interest in how the positions

are to be distributed. Bass v. Rockefeller, 331 F. Supp. 945 (1971).

Social Welfare maintains that it would be possible for Moore to bring this action without affecting the rights of anyone else. This is not true if Moore and Welfare Rights secure the relief which they seek as the judgment would benefit the named Plaintiffs and other persons similarly situated, Galvan v. Levine, 490 F.2d 1255 (1973) (2d.Cir.), with Social Welfare being required to create the entire fund of positions. In addition were there to be a decision on the merits subsequent litigation by others similarly situated would be affected by the doctrine, stare decisis.

The value of the positions which Social Welfare has created subsequent to the commencement of this suit is ascertainable (See Plaintiffs' Brief p. 17) and is substantially in excess of $10,000.00. In addition, Moore and Welfare Rights in their Second Amended Complaint alleged that Social Welfare was not in compliance with the committment in the Plan to an annual progression in the number of positions within agency capability

which would require that additional jobs be created. (A-36-37).

Under either the interest in distribution test or the essential party test the jobs which Moore and Welfare Rights are requesting are a fund in whose existence all persons situated similarly to Moore and the members of Welfare Rights have a common and undivided interest.

Aggregation of claims in this fund is accordingly allowable.

Zahn v. International Paper Co., 42 U.S.L.W. 4087 (U.S. Dec. 17, 1973) involved the claims of named Plaintiffs and of a sought after class which were separate and distinct claims and is clearly distinguishable from Moore.

The right to welfare assistance is a matter of statutory entitlement not an inherent right. Goldberg v. Kelley, 397 U.S. 254, 25L. Ed. 2d 287, 90 S.Ct. 1011, (1970).

Moore and Welfare Rights are similarly, under Federal Law and the State plan, entitled to the creation of the positions sought.

As stated in Senate Report (Finance Committee) No. 744 Nov. 14, 1967 (Accompanying HR 12080) "[t]The committee bill requires the State to train and use subprofessional staff with particular emphasis on the use of welfare recipients and other persons of low income, as community service aides for the kinds of jobs appropriate for them in the public assistance, child welfare, and health programs under the Social Security Act." The report further provides:

> "The committee is aware that a variety of jobs must be done in the administration of the public assistance programs and that not all of them require the services of professional staff. Some tasks can be done by persons with less than college education - high school graduates or even by persons with less than high school education. The use of subprofessional staff has not been sufficiently developed by public welfare agencies nor has the use of community service aides reached its potential. For this reason, the bill would require the States to amend their plans by July 1, 1969, to provide for the training and effective use of paid subprofessional staff emphasizing the full-time or part-time employment of recipients and other persons of low income as community aides."

"When two or more Plaintiffs, having separate and distinct demands, unite for convenience and economy in a single suit, it is essential that the demand of each be of the requisite jurisdictional amount; but when several Plaintiffs unite to enforce a single title or right, in which they have a common and undivided interest, it is enough if their interest collectively equal the jurisdictional amount." Troy Bank v. G.A. Whitehead & Co., 222 U.S. 39, 32 S.Ct. 9,56 L.Ed. 81 (1911).

Dixon v. Northwestern National Bank, 276 F. Supp. 96 (D. Minn. 1967) was an action by eight past employees of a construction company against a trustee bank which had allegedly improperly invested funds from the employees profit sharing trust fund. The Plaintiffs demanded judgment against Defendants in two lump sums of $45,800.00 compensatory and $250,000.00 punitive damages. The complaint contained no individual prayers for relief and the action was not a class action.

The holding in Dixon was that the claims of the Plaintiffs could be aggregated based upon the common and joint nature of the claims even though the case was not a class action.

The members of Welfare Rights are injured by the actions which it complains and accordingly it may represent those members in a proceeding for judicial review. Sierra Club v. Morton, 405 U.S. 727, 31 L.Ed.2d 636, 92 S.Ct. 1361 (1972).

The claims of all of the members of Welfare Rights and of Thomas Moore may thus be aggregated.

In addition to Dixon, as discussed in Plaintiffs' brief, in National Welfare Rights Organization v. U.S. Department of Health, Education and Welfare, Civil Action No. 264-73 (D. Ct. D.C. Oct. 1973) the trust fund theory of Bass was applied and jurisdiction found under §1331 in an action which was not allowed to proceed as a class action.

With regard to the class action aspect the Court stated:

> "[t]hat NWRO will fairly and adequately represent the interests of its members and all welfare recipients. Considering this, it is unnecessary to maintain this action designated as a "class action" as such. It should be born in mind that the Court is empowered to grant declaratory judgment and injunctive relief which would run to the entire class plaintiff seeks to represent; therefore, in the interests of simplicity and judicial economy, the class action aspect of the suit is dismissed." at p. 9.

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CERTIFICATE OF SERVICE

I hereby certify that I have served two copies of Plaintiffs' Reply Brief upon David L. Kalib, Esq., Assistant Attorney General, Attorney for Defendant, by posting copies of same in a United States mail receptacle, first class mail, addressed to his last known office address, Department of Social Welfare, 4 East State Street, Montpelier, Vermont, 05602, on this 24th day of May, 1974.

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